

Ameren Services

One Ameren Plaza  
1901 Chouteau Avenue  
PO Box 66149  
St. Louis, MO 63166-6149  
**314.621.3222**

314.554.2514  
314.554.4014 (fax)  
Tbyrne@ameren.com

October 20, 2000

**VIA FEDERAL EXPRESS**



Mr. Gary Schechter  
Director-Office of Transportation Counsel  
Illinois Commerce Commission  
527 East Capitol Ave.  
Springfield, IL 62701

RE: Ameren Energy Generating Company's Newton Plant Rail Spur

Dear Mr. Schechter:

As you may recall, in the last few weeks, I and two attorneys representing Ameren Energy Generating Company (AEGC), contacted you to discuss the above-referenced project. The relevant facts are these: AEGC, an unregulated electric generating company, is in the process of designing and constructing a rail spur of between four and five miles in length which will connect its Newton Electric Generating Plant to the Indiana Railroad. The spur will parallel the tracks of the Illinois Central Railroad for a large portion of the route, and it will cross six roads in Jasper County, Illinois. The spur will be used to bring coal into the Newton Plant on a daily basis, and occasionally to remove ash from the plant. Approximately two trains per day will use the Newton Spur, and the trains will be operated at low speed. The Newton Spur will be privately owned and operated, and will be used only to serve the needs of AEGC's Newton Plant.

Last summer when the spur was being designed, AEGC considered the possibility that it would be required to obtain Illinois Commerce Commission (ICC) approval prior to constructing the road crossings. However, a review of the relevant Illinois statutes indicated that only "rail carriers" are required to obtain such pre-approval of road crossings. (See 625 ILCS 5/18c-7401(3).) The statutes define "rail carrier" as "any person engaged in the transportation of property or passengers for hire by railroad, together with all employees or agents of such person or entity, and all property used, controlled, or owned by such person or entity." (See 625 ILCS 5/18c-1104 (30).) The statutes also subject rail carriers to other regulatory obligations with the ICC. (See, for example, 625 ILCS 5/18c-7201.)

Since AEGC does not and will not engage in the transportation of property or passengers for hire, under the clear meaning of this statute it is not a "rail carrier," and therefore we concluded that no filing with the ICC was necessary prior to the construction of the Newton Spur crossings. However, to make absolutely certain that no filing was required, in June of this year I contacted the Rail Carrier Department of the ICC. The gentleman I spoke to confirmed that under Illinois law, where a rail spur is constructed for purely private use, the owner is not required to register as a "rail carrier" or petition the ICC for authority to cross roads. However, he did point out that a private carrier would have to negotiate the terms of the road crossings with the county highway department, or other local government agency in charge of the roads. In addition, he pointed out that certain ICC regulations, which address clearance and other items, apply to both private spurs and rail carriers.

AEGC completed the design of the road crossings, and presented them to the Jasper County and Wade Township officials responsible for the roads which the spur would cross. The county and township officials voiced their general satisfaction with the plans for the crossings and indicated that these plans would be approved. However, before the plans were finally approved, a representative of the Illinois Central Railroad, which would be bypassed by the Newton Spur, contacted the county and township officials and alleged that AEGC was required to obtain ICC approval prior to constructing the road crossings. When the Jasper County engineer contacted the ICC Staff, he was told that AEGC was required to obtain ICC approval prior to constructing the road crossings. Such approval takes from four to six months, a delay which would subject AEGC to catastrophic economic consequences at this late point in the project. Subsequent to this conversation, the county and township officials issued permits for the road crossings.

AEGC remains completely convinced that it is not offering services for hire, that it is not a "rail carrier" under Illinois law, and that it is not subject to the requirement that it obtain pre-approval from the ICC in order to construct the road crossings for its private spur. According to the law firms AEGC has retained to research this issue, this result is dictated not only by the clear meaning of Illinois statutes, but also by federal law. (See attached legal opinion of Troutman Sanders LLP.) We are fully prepared to defend this position in court to the extent that it is necessary to do so to protect the substantial economic interest that is at stake in this project.

However, notwithstanding this legal position, we share your concern that the road crossings must be designed and constructed in a manner that fully protects the public. Neither AEGC nor the ICC would be benefited by the construction of an unsafe crossing, or the loss of life and property that could result. In an effort to avoid any safety related problems, I am enclosing several documents for the ICC Staff's review. These include construction plans for each of the road crossings, as well as a letter from AEGC's design consultant, Design Nine, Inc., which states that the designs of these crossings meet or surpass current industry standards, and standards

Mr. Gary Schechter  
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typically required by the ICC for road crossings constructed by rail carriers. I am hopeful that these materials will satisfy the ICC Staff that the road crossings will indeed be safe, particularly given Design Nine's substantial experience in designing rail crossings in Illinois.

In addition, AEGC would like to have the opportunity to meet with the ICC Staff, within the next week, to discuss these plans, and we would welcome any suggestions you might have to improve the safety at the road crossings. Notwithstanding the fact that AEGC believes the ICC possesses no statutory authority to require pre-approval of these crossings, we have a great deal of respect for the expertise of the ICC Staff in ensuring that road crossings are designed to be safe. It is in AEGC's interest, as well as the public interest, to obtain ICC Staff input concerning the design and construction of the road crossings, no matter how the ICC jurisdictional issue is ultimately resolved. If public safety, as you have previously indicated, is your true concern, AEGC stands committed to make any reasonable modifications to its plans requested by your Staff. Please call me, at (314) 554-2514 so that a meeting can be promptly arranged at a date and time convenient to you.

I hope that this letter provides you with a more complete understanding of AEGC's position with regard to the construction of its spur, and I hope it provides us an opportunity to cooperate in meeting the paramount goal of protecting public safety, even if the issue of ICC jurisdiction over the spur will ultimately have to be resolved through litigation. Please call me if you have any questions about this letter, or if I can provide you any additional information about AEGC's spur. I look forward to hearing from you soon.

Sincerely,

A handwritten signature in cursive script, appearing to read "Thomas M. Byrne", with a long horizontal flourish extending to the right.

Thomas M. Byrne  
Associate General Counsel

TMB/dhb  
Attachments

# TROUTMAN SANDERS LLP

## MEMORANDUM

TO: Steve Sullivan  
Tom Byrne

FROM: John Molm  
David Reeves  
Tom Healey

RE: Illinois Commerce Commission Review of Line Construction Near Newton, IL

DATE: October 12, 2000

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Issue: Whether the Illinois Commerce Commission ("ILCC") may require Ameren Energy Generating Company ("AmerenEGC") to obtain a license or similar ILCC approval prior to constructing rail trackage connecting AmerenEGC's private track to the Indiana Rail Road Company ("INRD") near Newton, IL.

Conclusion: Based on the facts and law as set forth herein, it is our opinion that the ILCC lacks jurisdiction to impose such a prior approval requirement because AmerenEGC is not a "rail carrier" under Illinois law and because of exclusive federal jurisdiction over spur tracks. Nevertheless, federal rail safety standards will apply to construction and maintenance of the track, *see* 49 U.S.C. § 20106 and 49 C.F.R. § 213.2 (1999), and agreements should be reached with local authorities for crossing of local streets.

Facts: AmerenEGC's Newton Plant is located at the end of a rail spur in Jasper County, IL. The track in immediate proximity to the plant is owned by AmerenEGC. The only trackage connecting directly with that track at present is operated by Canadian National Railways, f/k/a Illinois Central Railroad Company ("CN/IC"). Neither the AmerenEGC plant nor the spur are listed by CN/IC as a station on its line; CN/IC's closest station is Lis, IL, located where the AmerenEGC spur joins the CN/IC line. CN/IC's line runs both east and west from the spur connection at Lis. To the east, IC's line connects to line of INRD at a point sometimes identified as INRD Junction, west of Newton. INRD has access over CN/IC's track to deliver coal to the Newton Plant by paying CN/IC an access fee.

AmerenEGC is ready to begin construction of a rail connection between the spur serving the Newton Plant and the INRD line. That connection, a single rail track of between four and five miles in length, would be constructed on property that AmerenEGC already owns or has the right

to use for that purpose. The track would merely connect the Newton Plant's spur to INRD's line. No other shippers are located along the planned route. AmerenEGC will not allow service to other shippers from the line. AmerenEGC will not hold itself out as a for-hire rail carrier and nor will it be compensated directly or indirectly for transportation on the line.

Discussion: Illinois statutes provide "no person shall begin or continue construction of any track or other facilities . . . for use in operations *as a rail carrier* unless such person has registered with the Commission as a rail carrier." (Emphasis added.) 625 ILCS 5/18c-7201(1). However, AmerenEGC does not fall within the definition of "rail carrier" under Illinois statutes.

AmerenEGC is not a "rail carrier" because it will not be "engaged in the transportation of property or passengers *for hire* by railroad." (Emphasis added.) For an operation to be "for-hire," it must involve direct or indirect compensation to the carrier. 625 ILCS 5/18c-1104(11). AmerenEGC, on the other hand, plans to construct a purely private line, on which no for-hire business will take place. AmerenEGC will not be paid directly or indirectly for the transportation. Accordingly, AmerenEGC clearly falls outside the statutory definition of "rail carrier," making the ILCC's jurisdiction under 625 ILCS 5/18c-7201 and 7401 inapplicable.<sup>1</sup> Moreover, the line to be built also falls outside the definition of "rail carrier" because it is not "property used, controlled or owned by *such* person or entity," *i.e.*, a for-hire transportation provider. The ILCC thus lacks prior approval authority over construction of this line.

ILCC's statutory lack of authority to require prior review and approval of this construction is also consistent with preemptive federal law. Illinois statutes acknowledge the federal government's ability to preempt ILCC regulatory authority. "The jurisdiction of the [ILCC] under this Sub-chapter shall be exclusive . . . *except to the extent that its jurisdiction is preempted by valid provisions of the Staggers Rail Act of 1980 or other valid federal statute, regulation, or order.*" (Emphasis added.) 625 ILCS 5/18c-7101.

The ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (Dec. 29, 1995) ("ICCTA") preempts state authority to require prior approval of rail line construction. *See* 49 U.S.C. § 10501(b) "Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." This preemption applies regardless of whether the track is classified as "railroad line" or merely as spur or industrial track. *See id.* and 49 U.S.C. § 10501(b)(2) "The jurisdiction of the Board over-- [ . . . ] (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive." The Conference Committee Report on ICCTA, Conf. Rept. No. 422, 104<sup>th</sup> Cong., 1<sup>st</sup>

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<sup>1</sup> The inappropriateness of applying other "rail carrier" requirements to AmerenEGC, such as the requirement for providing agents and agency stations, *see* 625 ILCS 5/18c-7203, emphasizes the impropriety of classifying AmerenEGC as a "rail carrier" under Illinois statutes. While it might be argued that portions of Section 7401 applying ILCC authority to "railroads," rather than "rail carriers" could apply, those provisions apply only to relocation and alteration of *existing* crossings, and are not prior approval requirements for construction of new crossings.

Sess. ("Conference Report"), refers to this as "exclusive Federal authority over auxiliary tracks and facilities." *Id.* at 167. Similarly, the Conference Report describes Section 10906, which eliminates the need for Board approval of spur track construction, as conforming to "the general pre-emption of State economic regulation of rail carriers." *Id.* at 182. Thus, construction of a spur track is exempt from state regulatory authority.

Troutman Sanders' experience as counsel with clients' construction of tracks of this type in other states is consistent with federal preemption in this area. Troutman Sanders is not aware of any of its clients ever having been required to obtain prior state approval to build track such as this, at least since passage of ICCTA. This is consistent with Surface Transportation Board precedent under ICCTA which has said, "[S]tate and local permitting or pre-clearance requirements . . . are preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to delay or deny the carrier the right to construct facilities or conduct operations." *Borough of Riverdale Petition for Declaratory Order—The New York, Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466 (served Sept. 9, 1999). The U.S. Court of Appeals for the Ninth Circuit has upheld this view. *See City of Auburn v. Surface Transportation Board*, 154 F.3d 1025 (9<sup>th</sup> Cir.), *cert. denied* 119 S.Ct. 2367 (1999). Thus, the statutory exclusion from ILCC prior review of this construction is consistent not only with Illinois law, but also with preemptive federal authority.

# DESIGN NINE, INC.

ENGINEERING SERVICES FOR  
RAILROADS AND INDUSTRY

11166 TESSON FERRY ROAD - SUITE 100  
ST. LOUIS, MO 63123-6966  
(314) 729-7600 FAX (314) 729-7610  
E-MAIL: info@design9.com

October 16, 2000

Mr. Thomas L. Hollenkamp, P.E.  
Supervising Engineer  
Ameren Services  
One Ameren Plaza  
1901 Chouteau Avenue  
P.O. Box 66149, MC 450  
St. Louis, Missouri 63166-6149

*RE: Highway Railway Grade Crossing Design for a New Lead Track to the Newton  
Power Station at Newton, Jasper County, Illinois.*

Dear Mr. Hollenkamp:

Mr. Scott Plocher has requested that the design considerations for the construction of highway railway grade crossings be detailed. The State of Illinois has their requirements detailed in their Administrative Code, Title 92, Chapter 11, Part 1535, Subchapter C. Another basis for design is the American Railway Engineering and Maintenance of Way Association (AREMA). AREMA has developed recommended guidelines for the construction and rehabilitation of railroad track, structures and facilities. AREMA Chapter 5, Part 8 contains the guidelines established by the railroad industry for highway railway grade crossings.

State of Illinois Administrative Code specifies that the roadway shall be in an even plain over the two rails extending that plain a minimum of 24" beyond the outside edges of each rail. At that point the roadway grade may ascend or descend at a grade not exceeding 1% to an additional distance of 25'. From this point out to the railroads right of way or to a point that is within control of the Illinois Commerce Commission at a grade not to exceed 5%.

The guidelines established by AREMA states that the roadway should be in an even plain over the two rails extending that plain a minimum of 2' outside each rail. The grade at a point 30' from the rails of the track may descend a maximum of 6" or ascend a maximum of 3" from which point the roadway is to be blended into the existing roadway surface at the extent of the railroads property or right of way.

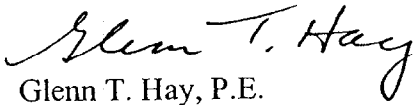
The drawings prepared for Ameren Generating Services at six public highway railroad grade crossing locations are well within these requirements and recommendations. All the grade crossings are in tangent track and have a 0.0% grade over the rails extending to a point 5' from the centerline of the track.

The south roadway approach to all six of the grade crossings continue from a point 5' from the centerline of the track to a point 30' from the centerline of the track at a 1.0% grade. From that point a 2.0% grade is extended to where the existing roadway is intersected.

The north roadway approaches at two of the grade crossings are identical to the south approaches as detailed above. The north approach at a third grade crossing descends from the Ameren track to the existing Canadian National/Illinois Central (CNIC) track at a 0.4% grade. The remaining three north approaches have been designed at the request of the local roadway agency; all descend at either a 2.0% or 1.6% from a point 5' from the centerline of the Ameren track to a point 5' from the centerline of the CNIC track. If the Illinois Administrative Code is used (most restrictive) there is sufficient room to construct the 25' of 1% grade off the Ameren and CNIC track with the resulting grade at two locations of 4% and the third location at a 2% grade, all below the 5% maximum.

If there are any qualifications or clarifications necessary please advise.

Sincerely,  
Design Nine, Inc.

  
Glenn T. Hay, P.E.



Ameren Services

One Ameren Plaza  
1901 Chouteau Avenue  
PO Box 66149  
St. Louis, MO 63166-6149  
314.621.3222

December 13, 2000

Mr. Michael E. Stead  
Rail Safety Program Administrator  
Illinois Commerce Commission  
527 East Capital Avenue  
Springfield, IL 62701



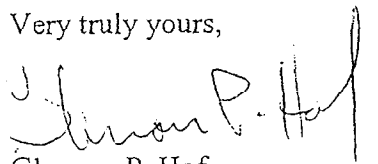
RE: Ameren Energy Generating Company's Newton Plant Rail Spur Extension

Dear Mr. Stead:

As a follow-up to our November 28 meeting, please find the enclosed copy of the latest Jasper County Traffic Map showing 1999 ADT's for the roads that our Newton Plant rail spur extension crosses. The ADT values are similar to the 1994 data that we provided in our meeting. As we discussed, we estimate on average two trains per day will operate over the new line. The trains will be limited to a maximum speed of 25 miles per hour. We further estimate that no more than six trains would operate over the line in any given 24-hour period.

Please call me at 314-554-4252 if you have any questions or need any additional information to assess the safety of the road crossings.

Very truly yours,

  
Glennon P. Hof  
Coal Transportation Director

LMF/  
Enclosure